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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 190

DR. ARNOLD M. LANDSBOROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 77–80) is reported at 168 F. (2d) 486.

JURISDICTION

The judgment of the Court of Appeals was entered June 1, 1948 (R. 75), and a petition for rehearing was denied July 12, 1948 (R. 89). The petition for a writ of certiorari was filed August 2, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, now 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the Government's evidence that petitioner had possession of narcotics in an unstamped container, which circumstance is by statute made "prima facie evidence" of illegal purchase, was sufficient to take the case to the jury in view of the fact that there was defense testimony in explanation of the possession.

2. Whether petitioner is entitled to a reversal of the conviction on his objection, raised for the first time on appeal, that the agents had neither an arrest warrant nor a search warrant when they seized the narcotics.

STATUTE INVOLVED

Section 1 of the Harrison Anti-Narcotic Act, as amended (sec. 2553 (a) of the Internal Revenue Code, 26 U. S. C. 2553 (a)), provides in pertinent part:

> It shall be unlawful for any person to purchase * * * any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *.

STATEMENT

Petitioner was indicted in the District Court for the Northern District of Ohio in a single

count charging him with illegal purchase of narcotics in violation of Section 1 of the Harrison Anti-Narcotic Act (R. 2). After a jury trial, he was convicted (R. 3) and sentenced to imprisonment for 15 months (R. 68). The judgment was affirmed on appeal (R. 75).

The evidence for the Government may be summarized as follows:

Petitioner is a physician, practicing in Garrettsville, Ohio, who was, up until 1945, registered to issue narcotic prescriptions. In that year, federal narcotic agents noticed that petitioner was issuing large numbers of prescriptions for unusual amounts of narcotics to one patient, Bishop. As a result of their investigation, petitioner surrendered his tax stamp and order forms, and his registration was cancelled on July 28, 1945. (R. 4–5, 26–28; cf. 18–24.)

On January 20, 1947, two federal narcotics agents, acting on information, examined the files of a drug store in Cleveland and found that Bishop, whom they knew to be a drug addict, had been purchasing narcotics there on prescriptions[1] (R. 5–6, 9, 12–13, 22–24). Setting a watch, they observed Bishop drive up to the store at about 1:00 p. m. in a car belonging to petitioner (R. 6, 8, 13). In about ten minutes Bishop returned to the car, drove 30 miles to his home in

[1] These prescriptions were issued to Bishop by another physician in Chardon, Ohio (R. 15, 17).

Garrettsville with the agents trailing, remained there a short while, and then drove down the road to petitioner's home, where he parked the car in the garage and entered the house through an entrance from the garage (R. 6–7, 9–10, 13). When Bishop came out of petitioner's house about ten minutes later, the agents questioned him and he admitted that he had brought petitioner some morphine tablets (R. 7, 13). Acting on this information, the agents, taking Bishop with them, went through the garage and walked into the kitchen where they found petitioner[2] (R. 7, 10, 13). Bishop told petitioner he had informed the agents that he had just brought him 40 morphine tablets; Bishop also said, in petitioner's presence, that he had been using petitioner's car for two months to drive to Cleveland to get narcotics, and that he had been bringing petitioner five or ten tablets of morphine every other day (R. 7–8, 13, 15). Petitioner at first denied having any drugs; he walked from the kitchen into the parlor accompanied by one of the agents, who asked him for whatever drugs he had; after some discussion, petitioner finally said, "Yes, I have some drugs"; he then walked back into the kitchen, took a small vial from his pocket and placed it on the table (R. 7, 14). The vial contained 40 quarter-grain tablets of morphine

[2] Petitioner admitted that the agents knocked on the door and that he was slow in answering it (R. 33).

sulphate[3] (R. 7–8, 14, 24–25, 28–30). Petitioner was then placed under arrest, but because of the state of his health he was permitted to remain at home that night (R. 8, 9, 14, 18). While arrangements were being made for him to report in Cleveland the next day, petitioner momentarily left the kitchen and went into his office to talk to a patient who had come in (R. 10–11, 12, 17).

The following evidence was adduced in petitioner's behalf:

Petitioner testified himself that in October 1944, at the request of Ripberger, a narcotics agent, he began to treat Bishop, who had suffered some sort of painful spinal injury; that at the time he began treatment he advised Ripberger by letter that Bishop required special surgical care which he was not qualified to perform; that he received no reply from Ripberger and then began to prescribe narcotics for Bishop; that Bishop's demands for the drug ultimately became so great that he voluntarily surrendered his narcotics tax stamp in July 1945 so as not to have to prescribe for him (R. 32, 34, 36–37, 38, 39). Petitioner also testified that he had taken morphine himself in 1945 and 1946 on the prescription of his attending physician as the result of two serious

[3] These tablets were not a part of the purchase made by Bishop in the Cleveland drug store *on that day* (R. 25). But the Government's witness did not testify, as implied in the petition (Pet. 7), that Bishop had not purchased the contents of the bottle on some previous occasion.

illnesses (R. 32–33); on cross-examination, however, he admitted prescribing narcotics for himself, and admitted having signed a statement to the effect that he started using narcotics in 1940 (R. 37–38).

Petitioner denied that he had ever received narcotics from Bishop (R. 34, 39, 44, 46, 47). In respect of the events of January 20, 1947, he testified that he had been bedridden in the hospital and at his home for several months as the result of a broken hip and that on his return from the hospital his physician prescribed morphine for him, that he intended to start for Florida shortly to recuperate, and that some days previously his physician had issued him a prescription for 50 tablets of morphine sulphate for the trip (R. 33, 35). He stated that the prescription was filled in Ravenna, Ohio, and that someone in his household had, unknown to him, removed the tablets from the cardboard box in which they had been dispensed and placed them in a glass vial to prevent breakage in travelling (R. 35, 43, 45). Petitioner also testified that Bishop had been taking care of the furnace in his home during his illness and that was the reason for Bishop's visit on January 20, 1947 (R. 36, 47). He said that when the agents first entered the kitchen that day they asked him whether he had any legal narcotics on prescription; he replied that he had, but that he did not know where they were (R. 35, 42, 43). At that moment a patient

entered the office and he excused himself and walked through the house to the office (R. 33–34, 42–43). There he noticed the vial containing the morphine tablets lying on a table; not knowing what it was, but thinking that it should not be lying there, he picked it up and put it in his pocket (R. 34, 35, 41, 42–43). He said that when he returned to the kitchen the agents started to search him, so he took the vial out of his pocket and put it on the table without comment (R. 34, 42, 44, 45).

Petitioner's wife testified that his physician prescribed 50 tablets of morphine sulphate for the trip to Florida; that she had the prescription filled in a store in Garrettsville; that she transferred the tablets from the cardboard box to the vial to prevent breakage; and that she left the vial on the table in the office (R. 49–50). On cross-examination she stated that she had not kept the cardboard box (R. 53). She admitted that she had used narcotics herself and that she had signed a medical addict's report (R. 52, 54). She also admitted that she knew Bishop was an addict (R. 55).

ARGUMENT

1. At the end of the Government's case, and again at the close of all the evidence, petitioner moved for a directed verdict on the ground that the evidence for the prosecution failed to establish an illegal purchase (R. 30–31, 59–60). Peti-

tioner contends that it was error to deny the motion; he argues that although evidence of possession of unstamped narcotics gives rise under the statute to a presumption of illegal purchase, the presumption alone is insufficient to support a conviction where the defendant presents uncontradicted evidence reasonably tending to explain the fact of possession (Pet. 5, 7–10).

In the first place, however, the fact of possession did not stand alone in the case, and it is not true, as stated in the petition (Pet. 7), that there was "not one word of testimony offered at the trial by the United States relating to the source of the morphine sulphate tablets in question." In addition to the fact that petitioner had possession of the unstamped morphine, there was evidence that Bishop was an addict (R. 22); that Bishop used petitioner's car to make regular trips to Cleveland to purchase drugs for himself (R. 15; cf. 9); that Bishop brought 5 or 10 tablets of morphine to petitioner every other day (R. 15); and that Bishop brought petitioner 40 tablets on this particular day (R. 13). Consequently there was evidence to support the conclusion that petitioner received the morphine from Bishop in consideration for the use of his car.[4]

[4] The conclusion is further supported by petitioner's admission that he had paid money to Bishop (R. 45). Petitioner explained that this was for Bishop's services in caring for the furnace (R. 47). But the jury were not bound to accept this explanation.

But even if the fact of possession stands alone in the Government's case, the defendant is not entitled to a judgment of acquittal simply because he presents some explanation in rebuttal of the Government's prima facie case. The proffered explanation must be clear, candid, and unimpeached, so that the jury would have no basis for disbelieving it. The circuit courts of appeals have frequently upheld convictions under the Harrison Act resting upon the mere fact of possession, in the absence of a credible and unimpeached explanation. See, e. g., *Goode* v. *United States,* 149 F. (2d) 377 (App. D. C.); *Stobble* v. *United States,* 91 F. (2d) 69 (C. C. A. 7); *Acuna* v. *United States,* 74 F. (2d) 359 (C. C. A. 5); *Gowling* v. *United States,* 64 F. (2d) 796, 798 (C. C. A. 6); *Davis* v. *United States,* 16 F. (2d) 778 (C. C. A. 5); and cf. *Ezzard* v. *United States,* 7 F. (2d) 808, 812 (C. C. A. 8). This Court has stated the requirements for rebuttal of a presumption in terms of "clear, distinct and convincing proof" (*Fresh* v. *Gilson,* 16 Pet. 327, 331); "ascertained and established facts" (*Lincoln* v. *French,* 105 U. S. 614, 617); "substantial proof" (*New York Life Insurance Co.* v. *Gamer,* 303 U. S. 161, 170). See also *Mobile, Jackson and Kansas City R. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43; *Commercial Molasses Corp.* v. *New York Tank Barge Corp.,* 314 U. S. 104, 111. The expressions in these cases presuppose that normally

the question whether an uncorroborated presumption has been rebutted is one for the jury. In *Davis* v. *United States,* 160 U. S. 469, a criminal case, where the defense was insanity and the Government relied solely upon the presumption of sanity, this Court discussed the quantum of evidence necessary to rebut the presumption. The underlying assumption, again, was that the jury could find the defendant sane on the basis of the presumption alone, despite defense testimony to the contrary. We think that Congress certainly intended that the presumption under the Harrison Act should remain in the case unless rebutted by clear, candid, and unimpeached testimony. For such presumptions are created to meet the exigencies of normally incriminating situations where, as here, the prosecution usually cannot produce direct evidence of a violation of law and the defendant, who knows the truth, has it within his power to explain the suspicious circumstances and bring the truth to light. If the defendant is to be allowed to rebut the presumption by any explanation, however incredible, in a situation where the prosecution cannot normally produce evidence, to what point did Congress create the presumption?[5]

As will be noted from the summary of the evidence set forth in the Statement (*supra,* pp.

[5] See the exhaustive treatment of this point in our brief in *Tot* v. *United States*, No. 569, O. T. 1942, pp. 9–30.

3–7), petitioner's explanation of his possession was contradicted in important respects by the Government's evidence. For example, petitioner denied that he had ever received narcotics from Bishop; the Government's evidence showed that Bishop brought him morphine every other day. Petitioner said he obtained the 40 tablets in the vial on a prescription; the Government witnesses testified that Bishop said in petitioner's presence that he had just delivered them to him. Petitioner testified that he picked up the vial when he went to the office to see a patient; the Government witnesses testified that petitioner had already surrendered the vial before the patient arrived. Furthermore, the credibility of petitioner's wife was impeached. Petitioner testified that his alleged prescription for 50 tablets of morphine was filled in Ravenna; his wife said it was filled in Garretsville. Both petitioner and his wife admitted that they used narcotics. And one of the witnesses who testified to petitioner's good reputation admitted on cross-examination that it was common gossip in Garretsville that petitioner was addicted to the use of narcotics. We think it is manifest, therefore, that the evidence was not such as to require the trial court to direct an acquittal.

2. Petitioner also contends that his conviction should be reversed because the record fails to show that the officers had either a warrant for

his arrest or a search warrant (Pet. 5–6, 10–13). This point was not raised in the trial court and it is an obvious afterthought occasioned by three recent decisions of this Court cited by petitioner (Pet. 12–13).

It is settled that an objection on this score must be raised at or before trial. *Segurola* v. *United States*, 275 U. S. 106, 111; Rule 41 (e), F. R. Crim. P.[6] Petitioner certainly had ample opportunity to raise the issue in the trial court, for he knew all the circumstances whereby the officers obtained the narcotics from his possession. The mere absence of evidence in the record as to a warrant does not necessarily mean that the officers were without one. A timely motion would have revealed the facts, and petitioner, having ignored the opportunity, cannot now be heard to say that the obtention was illegal.[7]

Furthermore, even on the supposition that the agents had no warrant of any kind, there was no illegal seizure. The agents clearly had reasonable cause to believe that a felony had been com-

[6] "* * * The motion [to suppress evidence] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

[7] Petitioner's reliance on *Weems* v. *United States*, 217 U. S. 349, and *Wiburg* v. *United States*, 163 U. S. 632, which hold that this Court will notice an unpreserved error which infects the whole trial with unfairness, is clearly misplaced since there was no error here.

mitted for they were told by Bishop that he had just given 40 tablets of morphine to petitioner. They entered, apparently to question petitioner, and he surrendered the drugs to them when he saw that they already knew he had them. There was no search and no seizure. Petitioner's reliance on *United States* v. *DiRe,* 332 U. S. 581, *Johnson* v. *United States,* 333 U. S. 10; and *Trupiano* v. *United States,* 334 U. S. 699, is therefore unavailing.

CONCLUSION

The decision of the Court of Appeals is correct and no conflict is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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